

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
ALTON N. FILAN,)
Appellant,)
vs.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Respondent.)

PCHB No. 449

FINAL FINDINGS OF FACT,
CONCLUSIONS AND ORDER

THIS MATTER being an appeal of a \$250.00 civil penalty for an alleged water discharge violation of RCW 90.48.080; having come on regularly for hearing before the Pollution Control Hearings Board on the 28th day of March, 1974, at Walla Walla, Washington; and appellant Alton N. Filan appearing pro se, and respondent Washington State Department of Ecology appearing through its Assistant Attorney General, Charles W. Lean; and Board member present at the hearing being Walt Woodward; and the Board having considered the sworn testimony, exhibits, records and files herein and closing arguments and having entered on

1 the 16th day of April, 1974, its proposed Findings of Fact, Conclusions
2 and Order; and the Board having served said proposed Findings,
3 Conclusions and Order upon all parties herein by certified mail, return
4 receipt requested and twenty days having elapsed from said service; and

5 The Board having received no exceptions to said proposed Findings,
6 Conclusions and Order; and the Board being fully advised in the premises;
7 now therefore,

8 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed
9 Findings of Fact, Conclusions and Order, dated the 16th day of April,
10 1974, and incorporated by this reference herein and attached hereto as
11 Exhibit A, are adopted and hereby entered as the Board's Final Findings
12 of Fact, Conclusions and Order herein.

13 DONE at Lacey, Washington this 7th day of May, 1974.

14 POLLUTION CONTROL HEARINGS BOARD

15
16 Walt Woodward
17 WALT WOODWARD, Chairman

18 W. A. Gissberg
19 W. A. GISSBERG, Member

20
21 MARY ELLEN McCaffree
22 MARY ELLEN McCaffree, Member

23
24
25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS AND ORDER

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
ALTON N. FILAN,)
Appellant,)
vs.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Respondent.)

PCHB No. 449

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

This matter, the appeal of a \$250.00 civil penalty for an alleged water discharge violation of RCW 90.48.080, came before the Pollution Control Hearings Board (Walt Woodward, presiding officer) in the Council Chambers of the City Hall, Walla Walla, at 10:00 a.m., March 28, 1974.

Appellant appeared pro se; respondent through Charles W. Lean, assistant attorney general. Gene Heath, Clarkston Court reporter, recorded the proceedings.

Witnesses were sworn and testified. Exhibits were admitted. Closing arguments were made.

EXHIBIT A

1 From testimony heard, exhibits examined, arguments considered and
2 transcript reviewed, the Pollution Control Hearings Board makes these

3 FINDINGS OF FACT

4 I.

5 Appellant, a grain farmer and inventor, has owned and operated a
6 farm on 330 acres of land some three miles south of Waitsburg, Walla
7 Walla County, since 1963. Coppel Creek, containing water of this state
8 and a tributary of the Touchet River, flows through and is bordered on
9 both sides by 210 of those acres.

10 To irrigate his land, appellant pumps water from the creek at a
11 point about two miles south and upstream from Waitsburg. Appellant has
12 devised a Diesel-powered, self-propelled machine (called the "Slope
13 Water") which follows a winch-directed path as it sprays water and
14 liquid fertilizer on the land through a high-pressure sprinkler system.

15 From tanks containing diluted ammonia, a metered amount of liquid
16 fertilizer is forced into the sprinkler system.

17 The water pumped from the creek is filtered by a screen before
18 it enters a concrete sump. From the sump, 60 percent of the water is
19 drawn into the sprinkler system, the remainder re-entering the creek
20 through discharge pipes near the top of the sump.

21 When any portion of the pumping system is shut down, all pumping
22 units of the system are shut down and become inoperative.

23 II.

24 The system has operated satisfactorily and without complaint for
25 four years except for the instant matter.

26 III.

27 Appellant contends, but did not prove, that the waters of Coppel

1 Creek are polluted upstream of his irrigation point of withdrawal. He
2 has seen and smelled sewage-odor foam piled to a height of one foot on
3 a snag in the creek upstream of his irrigation withdrawal. He saw
4 such an accumulation on May 6 or 7, 1973.

5 IV.

6 On or shortly before May 5, 1973, there was a fish kill in Coppei
7 Creek starting at the point where appellant's discharge pipes re-
8 introduce water to the creek and extending downstream to Waitsburg.
9 On May 5, 1973, fifteen dead rainbow trout 4 to 9 inches in length
10 were counted by two fish biologists in a 150-foot section of the creek
11 about one-half a mile downstream from appellant's discharge pipes;
12 many more non-game dead fish also were counted in this same section.
13 Dead fish in large numbers were seen by the biologists in the creek
14 from appellant's discharge pipes to Waitsburg; no dead fish were seen
15 upstream of appellant's discharge or downstream of the lower limit of
16 the fish kill at Waitsburg. From the actual count made in the 150-foot
17 section, it is estimated that up to 86,000 non-game and 2,100 rainbow
18 trout were killed.

19 V.

20 A sample of water taken on May 5, 1973 from inside appellant's
21 concrete sump at the point of entry to a discharge pipe smelled strongly
22 of ammonia. Laboratory analysis of this sample showed greater than
23 2,480 parts per million of ammonia. At the time the sample was taken,
24 appellant's irrigation system was shut down and inoperative, but a
25 trickle of liquid amounting to about one gallon per minute was leaving
26 the concrete sump, passing through the discharge pipe and entering
27 Coppei Creek.

FINDINGS OF FACT,

1 VI.

2 Ammonia present in water to one part per million can kill fish.

3 VII.

4 No pollution source, other than the liquid entering the creek
5 from appellant's discharge pipe, was found on May 5, 1973 in the area of
6 the fish kill as defined in Finding of Fact IV.

7 VIII.

8 At about 11:30 p.m. on May 3, 1973, appellant shut down the pumps
9 in his irrigation system because of a mechanical breakdown in his
10 "Slope Water" machine. The system remained shut down until the evening
11 of May 5, 1973 while repairs were made.

12 IX.

13 Appellant contends, but did not prove, that a check valve on the
14 line between the high-pressure pump and the point of entry of the
15 liquid ammonia fertilizer, prevents water and fertilizer from flowing
16 "backward" into the sump. He concedes that it might be "possible" for
17 the valve to malfunction.

18 X.

19 If a total shutdown of appellant's irrigation pumping system
20 causes no water to be lifted from the creek to the sump and if there is
21 no rain, then any overflow of liquid from the sump into the discharge
22 pipe is coming from water and fertilizer in the sprinkler system. There
23 was no rain in the instant area of Coppei Creek on May 5, 1973.

24 XI.

25 Appellant contends, but did not prove, that the State Department
26 of Game, "may" be trying to "get" him because of a dispute in another

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 matter. A Game Department fish biologist involved in the instant matter
2 categorically denied this allegation.

3 XII.

4 As a result of the fish kill, respondent, under authority of
5 RCW 90.48.144, on July 11, 1973, levied a civil penalty of \$250.00 on
6 appellant for violation of RCW 90.48.080. On July 28, 1973, appellant
7 sought relief from the penalty. On August 13, 1973, respondent
8 disallowed the petition for relief and re-affirmed the penalty, which
9 is the subject of this appeal.

10 XIII.

11 Any Conclusion of Law which may be deemed to be a Finding of Fact
12 is herewith adopted as same.

13 From these Findings, the Pollution Control Hearings Board comes
14 to these

15 CONCLUSIONS

16 I.

17 No showing of negligence is necessary for the proving of a
18 violation of RCW 90.48.080 whose terms simply make it unlawful to
19 cause, permit or suffer" any polluting matter to "drain" into the waters
20 of this state. That statute establishes liability without fault, or
21 strict liability.

22 II.

23 The preponderance of evidence in this matter shows that appellant,
24 and only appellant, caused the entry of a lethal amount of ammonia to
25 the waters of Coppei Creek on or about May 5, 1973, causing a kill of
26 both non-game and game fish. Appellant, therefore, is in violation

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

III.

RCW 90.48.144 authorizes respondent to levy a civil penalty up to \$5,000.00 for any violation of RCW 90.48.080. The instant penalty, being 5 percent of that allowable maximum, is reasonable.

IV.

Any Finding of Fact deemed a Conclusion of Law is herewith adopted as same.

Therefore, the Pollution Control Hearings Board issues this

ORDER

The appeal is denied and the civil penalty of \$250.00 is affirmed.

DONE at Lacey, Washington this 16th day of April, 1974.

POLLUTION CONTROL HEARINGS BOARD

Walt Woodward
WALT WOODWARD, Chairman

Mary Ellen McCaffree
MARY ELLEN McCAFFREE, Member

W. A. Gissberg
W. A. GISSBERG, Member

FINDINGS OF FACT,
CONCLUSIONS AND ORDER